

McGraw-Hill Broadcasting Company, Inc., d/b/a KGTV and Nabet, The Broadcasting and Cable Television Workers Section of CWA, Local 54, AFL-CIO, Petitioner. Case 21-RC-19478

September 30, 1999

DECISION ON REVIEW AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX
AND LIEBMAN

On May 17, 1995, the Regional Director for Region 21 issued a Decision and Order in the above-entitled proceeding, in which the Petitioner seeks to represent the Employer's five producer/directors who are employed in the program operations department of its television station, KGTV, in San Diego, California. The Employer contends that these producer/directors are supervisors within the meaning of Section 2(11) of the Act. The Regional Director found that they are supervisors and dismissed the instant petition.

Thereafter, in accord with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Petitioner filed a timely request for review of the Regional Director's decision. By Order dated July 25, 1995, the Board granted the Petitioner's request for review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this case, including the Employer's and the Petitioner's briefs on review, and concludes, contrary to the Regional Director, that the Employer's five producer/directors are not statutory supervisors.

I. THE FACTS

The Employer operates a television broadcasting facility in San Diego, California. The Petitioner seeks a unit limited to the five producer/directors who work in the Employer's program operations department (Deborah Renzell, Bill Piper, Donn Achen, Ernie Taix, and Amielle Moyer). The department is headed by the director of programming, who oversees the executive producer, Hal Grant, who in turn is the immediate supervisor of the employees the Petitioner seeks to represent. Grant also acts as liaison between the news and production departments, is the executive producer for the station's "signature series" (documentary-style specials), and coordinates the scheduling of technicians and facility usage with Mike Biltucci, the manager of broadcast operations.¹

The five producer/directors have varying responsibilities, although Grant testified that all five are capable of directing a news broadcast show and/or producing and directing special projects. Bill Piper directs the morning and midday news broadcasts and worked on one special

project during the year prior to the hearing. Donn Achen directs the 6:30 and 11 p.m. news broadcasts, and occasionally is assigned to produce and direct other special projects. Ernie Taix spends approximately 30-40 percent of his time on special projects and directs the 5 p.m. weekday broadcasts. Amielle Moyer directs weekend news broadcasts, works 3 days per week on special projects, and covers for the others when anyone is out. Deborah Renzell, who described her job as an "in-house ad agency" for the Employer's clients, testified that she basically produces only commercials and infomercials and has not directed any news broadcasts. Executive Producer Grant makes all assignments of the producer/directors, and he indicates on the assignment/schedule sheet whether the particular individual is to act as a director on a news broadcast or to work as a producer on a special project. Work schedules for Piper and Achen are determined by the broadcasts they normally direct, while schedules for the other three vary depending on the work they are doing.

When acting as the director for news broadcasts, the producer/directors work in conjunction with the news show producers,² the assistant news director, and the executive producer in selecting the stories that are to be presented in the broadcast. All work collectively to compose the script. The news show producer then reviews the show with the director. According to Grant, the news show producer is responsible for the news content of the show, while the director is responsible for the visual context of the show. Jeff Klotzmon—manager of the news department—has the ultimate responsibility for the production and direction of the news shows.

In the pre-production period, the director works from the "line-up" to determine the order in which a story or segment will be presented, which cameras and camera angles are to be used, whether additional props and/or graphics will be required, and when to broadcast videotapes or use the graphics. The selection of appropriate graphics is made in collaboration with the news show producer, among others, while the actual creation of the graphics is done by the technicians.

During the live broadcast, the director is in the control room along with the news show producer and the technical director. Any alteration of the content of the broadcast is a collaborative effort among them. The director "calls" the show, giving commands through headsets to the entire crew and dealing with each development as it occurs. For example, the director decides when to open a microphone, switch camera angles, or go to a commercial break. In addition, the director oversees the use of the TelePrompter by the on-camera talent. Although the newscasts are presented in a formatted structure the news director is required to handle the different situations that may arise during the live broadcast. Postbroadcast meet-

¹ Biltucci's responsibilities include the supervision of the Employer's 33 technical operators, as well as the building and landscape maintenance employees.

² The Petitioner does not seek to represent the news show producers, who are employed in the news departments.

ings are held after each newscast, where all participants meet with News Department Manager Klotzmon to go over the show and to review any mishaps.

All work on special projects is assigned by Executive Producer Grant, who then discusses the particular show's "angle" and budget with the producer/director he has assigned to the show. While Grant has overall responsibility for the Employer's "signature series" budget, the producer/directors are given authority to expend funds on their assigned special projects within the parameters Grant sets. According to Donn Achen, any money that the producer/director seeks to spend must be pre-approved, and all expense vouchers are subject to review and approval by Grant.

When acting as producer, the producer/director prepares a script for the special project, decides who will be in the show, arranges for interviews, selects the location(s) for the shoot, chooses any stock footage to be used, and orders all graphics, music, and/or props. During the actual filming, the producer/director, now working as the "director," decides on the composition and angle of the shots and cuts, and determines what editing is to be performed by the technicians. Although Grant provides his own views and expertise, the producer/director has total discretion in terms of determining the content, look, and feel of the show.

In a similar manner, Renzell meets directly with the Employer's clients to develop an idea or concept for a commercial and then works with the clients to create the commercial. Next, she writes the script, draws story boards, and arranges for and schedules everyone necessary for the actual shoot or videotaping (photographers, lighting assistants, actors and/or voiceover talent—if the client does not provide it). She also is responsible for directing the shoot, designing the graphics to be used, and generally overseeing all production aspects including the final editing. Renzell testified that, in addition to client commercials, she has produced "non-air" corporate and/or marketing tapes for clients and sales tapes for the Employer's own use.

II. THE REGIONAL DIRECTOR'S FINDINGS

The Regional Director found that the producer/directors employed in the Employer's program operations department are statutory supervisors. Although none of the five have the authority to hire, fire, evaluate, transfer, layoff, discipline, adjust grievances, reward employees, or effectively recommend such action, the Regional Director concluded that they exercise full discretion and authority in their work as producers of commercials and other special projects, and that "even in their work in the direction of regular news broadcasts, they each exercise authority and discretion sufficient to meet the statutory definition of supervisor."

More specifically, the Regional Director found that Renzell is a supervisor because she has "virtually com-

plete authority" over her projects to determine the content, write the script, select technical support employees, assign work to support employees, and authorize overtime if required. She noted in particular Renzell's artistic and technical control over the production, including the angle of the camera, the script for the actors, and even the color scheme for the lighting. The Regional Director found that Moyer and Achen are supervisors because, in directing special projects, they "hold authority, discretion and control" similar to that held by Renzell. *WDTN-TV (Hearst Broadcasting Corp.)*, 267 NLRB 326 (1983).

The Regional Director further found that Piper and Taix "will on occasion" function with the same authority, independence, and discretion as Moyer, Renzell, and Achen exercise during those times that Piper and Taix are assigned special projects. As to their primary duties as news directors, the Regional Director emphasized Piper's and Taix's responsibility for, inter alia, the selection of camera, deciding when to use videotapes and/or graphics, the actual scripting of the news to be broadcast, and "calling" the show. The Regional Director found that, in their special project assignments, they exercise full creative and technical control of the production and that they also responsibly direct other employees in their work as news directors.

The Regional Director concluded that the Employer has met its burden of establishing that these producer/directors have the "responsibility for the rundown for each broadcast and are not required to adhere rigidly to any format established by others." *WDTN-TV*, supra. Accordingly, the Regional Director concluded that the five producer/directors are supervisors because they exercise full discretion and authority in their work sufficient to meet the statutory definition of supervisor.

III. DISCUSSION AND CONCLUSIONS

Section 2(3) of the Act excludes "any individual employed as a supervisor from the definition of "employee." Section 2(11) of the Act defines "supervisor" as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is to be read in the disjunctive, and the "possession of any one of the authorities listed in [that section] places the employee invested with this authority in the supervisory class." *Ohio Power Co. v. NLRB*, 176 F.2d 385, 387 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949). However, the Board is cautious in finding supervisory status because supervisors are excluded from the protections of Section 7 of the Act. "In light of this, the

Board must guard against construing supervisory status too broadly to avoid unnecessarily stripping workers of their organizational rights.” *East Village Nursing & Rehabilitation Center v. NLRB*, 165 F.3d 960, 962 (D.C. Cir. 1999). See also *Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151, 1158 (7th Cir. 1970), *enfg.* 171 NLRB 1239 (1968), *cert. denied* 400 U.S. 831 (1970). Further, the burden of proving supervisory status is on the party alleging that such status exists. See, e.g., *Bennett Industries*, 313 NLRB 1363 (1994).

Contrary to the Regional Director, we find that the Employer has failed to meet its burden of establishing that its producer/directors are statutory supervisors. As more fully set forth in today’s companion decision, *KGW-TV*, 329 NLRB No. 39 (1999), the Board has found that similarly situated individuals in the broadcast industry were not Section 2(11) supervisors where they were part of an integrated production team in which their skills and responsibilities were joined in a collaborative effort with those of other news department employees in order to coordinate and develop a single product. *Westinghouse Broadcasting Co. (WBZ-TV)*, 215 NLRB 123 (1974).³ We find this precedent controlling in the instant case.

The Regional Director found that the producer/directors are supervisors based on their assignment and direction of work. In applying the indicia of assignment and responsible direction, the Board must distinguish between the exercise of independent judgment and the giving of routine instructions, and between the appearance of supervision and supervision in fact.⁴ As we discuss in *KGW-TV*, it is well established that having the mere authority to assign work does not establish statutory supervisory authority,⁵ and not every act of assignment constitutes statutory supervisory authority.⁶ As with every supervisory indicia, assignment must be done with independent judgment before it is considered to be supervisory under Section 2(11). Here, as we discuss below, we find that the facts do not demonstrate that producer/directors exercise such independent judgment in assigning employees.

Contrary to the Regional Director, we find that the producers do not exercise supervisory independent authority in relation to the employees they work with on commercials, tapes, or special projects. Thus, designation of support staff, including inter alia, reporters, photographers, and editing technicians, is routine and based on availability as shown on the monthly scheduling board prepared by higher management. If it is necessary to seek employ-

ees to work outside of regular hours, the producers must consult with their supervisor before anyone is scheduled for such an assignment. Thus, e.g., Renzell checks the monthly scheduling board prepared by Grant and the manager of broadcast operations to see who will be available or checks with her supervisor to see if anyone can work outside of regular hours. In these circumstances, we find that the producers do not exercise the independent judgment essential to a finding of supervisory status in assigning employees.⁷

Further, although the Regional Director found that the producer/directors have authority and control over projects they undertake, we conclude that they do not function as supervisors within the meaning of Section 2(11) of the Act when performing this work. Their responsibility is for the content and format of each production. The latitude with which they exercise that responsibility does not constitute responsible direction requiring the use of supervisory judgment and, therefore, cannot be equated with Section 2(11) authority.

As the Regional Director found, Renzell regularly develops concepts and writes scripts after meeting with customers; “books the equipment” for the commercial or marketing tape, and during the actual filming, determines the composition and angle of shots, the cuts, when to use tape or graphics; and determines the substance of what is to be edited by the technicians. All of these tasks relate to the artistic or creative effect Renzell seeks to achieve. There was no contention that roles of Moyer and/or Achen differ in their work as producers of special projects.

Although the producers exercise discretion or judgment in making these determinations and communicating necessary directions to the various reporters, photographers, and technicians working with them, such discretion or judgment relates to their own responsibilities and is based on their experience and expertise. Thus, their authority to give directions to the employees working with them is not supervisory authority. Rather, such directions are incidental to the producers’ ability to perform their own work as it is the producers who are responsible for organizing and coordinating the productions. Moreover, the communication of the decisions they make, and the coordination of the implementation of such decisions, do not entail

³ See also *Post-Newsweek Stations*, 203 NLRB 522 (1973); *Meredith Corp. v. NLRB*, 679 F.2d 1332, 1342 (10th Cir. 1982), *enfg.* 243 NLRB 323 (1979).

⁴ *Providence Hospital*, 320 NLRB 717, 725 (1996), *enfd. sub nom. Providence Alaska Medical Center v. NLRB*, 121 F.3d 548 (9th Cir. 1997); *McCullough Environmental Services*, 306 NLRB 565 (1992), *enf. denied* 5 F.3d 923 (5th Cir. 1993).

⁵ See, e.g., *Mississippi Power & Light Co.*, 328 NLRB No. 146 (1999); *Ten Broeck Commons*, 320 NLRB 806, 811 (1996).

⁶ *Providence Hospital*, 320 NLRB at 727.

⁷ *KGW-TV*, *supra*; *North Shore Weeklies, Inc.*, 317 NLRB 1128 (1995). Although, as the Regional Director found, Renzell can “request” that an employee work overtime, the record does not support a finding that Renzell has the authority to “require” or “authorize” such overtime. Thus, Renzell testified that she normally works with three specific individuals between the hours of 8:30 a.m. to 5 p.m. and checks with the scheduling board to see if they are available when she needs them. If the work is outside regular normal working hours, Renzell stated that she will check with her supervisor “to see if we can have personnel at that time,” and then “we will put them on the scheduling board for that time.” Renzell further testified that she has been told that she “can ask the employee if he would like to work overtime, and if he agrees, we do it.”

the exercise of supervisory authority, as they are either routine in nature or are motivated by the creative or artistic effect the producers seek to achieve. See *KGW-TV*, supra; *Westinghouse Broadcasting Co. (WBZ-TV)*, supra at 125.

Similarly, Moyer and Achen as well as Piper and Taix, when functioning as directors for regularly scheduled newscasts, exercise influence and discretion, as well as artistic judgment, in the coordination and creation of each newscast. Thus, they collaborate on a regular, if not daily, basis with a variety of other employees (including skilled technicians, news specialists such as reporters, photographers, and on-air talent). As in the case of the producers, any discretion or judgment the directors exercise in making and communicating assignments or directions, relates to their own responsibilities and is based on their experience and expertise. Making such decisions is the essence of their jobs. The communication of those decisions and coordination of their implementation with their coworkers is done as part of an integrated production team. As in *KGW-TV* and the cases cited therein, the record shows that the instructions given to other employees are either almost routine in nature or are motivated by the creative or artistic effect the producers seek to achieve, and do not entail the exercise of supervisory judgment.⁸

Further, while the Regional Director found that the producer/directors have the responsibility for the rundown for each broadcast and are not required to adhere rigidly to the format established by others, the daily newscasts, in fact, are presented in a formatted structure. Any deviations made by the director calling the show deal with unexpected technical glitches, camera angles, or the opening or closing of a particular microphone. Thus, we conclude that the Regional Director also erred in finding that Piper and Taix are statutory supervisors. See, e.g., *Mississippi Power & Light Co.*, 328 NLRB No. 146 (1999). We stated today in *KGW-TV*, we recognize that it is often difficult to separate the exercise of judgment necessary to the performance of an individual's own job from the supervisory independent judgment of Section 2(11) of the Act, particularly where skilled employees are directing other skilled employees, or professional employees

are directing nonprofessional employees.⁹ However, the authority of an individual employee to direct another to perform discrete tasks stemming from the directing employee's experience, skills, training, or position does not constitute supervisory authority. In these circumstances, such directions simply are incidental to the employees' ability to perform their own work. As in *KGW-TV*, we find that the Employer's producer/directors—whether performing their responsibilities as “producers” or as “directors”—work as part of an integrated production team, each member of which is independently capable of executing his own assignment. *Westinghouse Broadcasting Co. (WBZ-TV)*, supra. *Meredith Corp.*, supra. See also *KGW-TV*, supra, slip op. at 4; *KDFW-TV*, 790 F.2d at 1278. Thus, their relationship to the other employees necessary to the successful production of the newscasts or special projects is not supervisory, but rather one of coworkers involved in separate but sequential functions in the development of a single product. See generally, *Post-Newsweek Stations*, supra at 523 (1973). It is only where the facts of a particular case have shown that similar producers or directors additionally played a role in, for example, hiring or disciplining employees, have such producers been found to be supervisors.¹⁰

In conclusion, it is clear that although the producer/directors exercise expert judgment in the execution of the creative and technical responsibilities of their jobs, it has not been established that they exercise supervisory judgment in assigning or directing other employees in the performance of their duties. Accordingly, we find that the Employer has not established that its producer/directors are statutory supervisors, and that the Regional Director erred in dismissing the instant petition.

ORDER

The Regional Director's finding that the Employer's producer/directors are statutory supervisors is reversed, and the petition is reinstated. The case is remanded to the Regional Director for further appropriate action.

⁹ *KGW-TV*, supra, slip op. at 6. See also *Providence Hospital*, 320 NLRB at 730.

¹⁰ See, e.g., *Westinghouse Broadcasting Co.*, 195 NLRB 339 (1972); *WDTN-TV*, supra. Compare *KDFW-TV*.

⁸ *KGW-TV*, supra; *Westinghouse Broadcasting Co.*, 215 NLRB at 125.